A **JR LINCKS EDUCATIONAL CONSULTANTS SDN BHD**

v.

GOH & SONS ENTERPRISE SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABDULL HAMID EMBONG JCA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: M-02-628-1998]
C 19 NOVEMBER 2007

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Learned judge's finding totally against weight of evidence - Learned judge failed to appreciate and evaluate oral testimony and contemporaneous*
D *documentary evidence - Whether appellate intervention warranted to prevent miscarriage of justice*

LANDLORD AND TENANT: *Creation - Tenancy - Whether enforceable tenancy can arise before execution of formal written tenancy agreement - Granting of tenancy by way of letter followed by handing*
E *over of possession of premises to tenant - Formal written tenancy agreement only executed subsequently - Tenancy to be construed in context of letter and formal written agreement*

LANDLORD AND TENANT: *Determination - Breach of covenants -*
F *Determination of respective rights and obligations of landlord and tenant - Tenancy created by letter and subsequent formal agreement - Equity and good conscience - Consequences of breach to be viewed in spirit and context in which tenancy was created*

G ***LANDLORD AND TENANT:*** *Determination - Breach by tenant - Tenant refusing to pay rental due to landlord's continuous breach of various covenants - Whether tenant's refusal to pay justified - Whether equitable withholding of rent amounts to willful non-payment - Whether amounts to sufficient ground for landlord to terminate a fixed term tenancy*
H *- Whether landlord may terminate tenancy where there is cross-claim by tenant arising from landlord's breaches*

LANDLORD AND TENANT: *Determination - Notice - Period of notice required to terminate a fixed term tenancy of business premises -*
I *Reasonable period not less than three months unless agreement provides contrary*

The appellant/plaintiff (J.R. Lincks Educational Consultants Sdn.Bhd.) and the respondent/defendant (Goh & Sons Enterprise Sdn. Bhd.) were the tenant and landlord respectively of 14 units of premises ("the said premises"). By a letter dated 22 July 1993 the defendant offered to rent the said premises to the plaintiff on terms and conditions set out in the said letter. The offer was accepted by the plaintiff. Although the tenancy was to commence from 1 September 1993, possession of the premises was given to the plaintiff only on 24 January 1994 due to delay in the issuance of the Certificate of Fitness. The duration of the fixed term tenancy was said to be from 1 March 1994 to 28 February 1997. The authorized use of the demised premises was "as offices and as a college". A formal tenancy agreement was only prepared and executed on 11 April 1994. The plaintiff claimed for specific performance of the terms of the tenancy and/or damages for breach of the said tenancy agreements. The defendant counterclaimed for vacant possession of the said premises together with arrears of rental and mesne profit. The learned High Court Judge ordered that the plaintiff deliver vacant possession of the premises to the defendant and that the plaintiff pay to the defendant arrears of rental as well as double rent. The plaintiff appealed against this decision. The issues to be determined in this appeal were (a) whether the plaintiff was entitled to any damages; and (b) whether the notice issued by the defendant dated 26 June 1995 to pay arrears of rental and to quit and deliver vacant possession was valid. The question of specific performance had become academic and did not arise since the tenancy of the premises had expired by effluxion of time.

Held (allowing the appeal)
Per KN Segara JCA:

(1) The plaintiff became tenant of the premises pursuant to the tenancy agreement by letter dated 22 July 1993, immediately upon the plaintiff being given possession of the premises on 24 January 1994, notwithstanding the execution of a formal written tenancy agreement subsequently. The learned judge had misdirected himself in ruling that there was no enforceable tenancy agreement on which the plaintiff could claim damages for any period before the formal written tenancy agreement was executed. (paras 15 & 16)

(2) On the facts of this case, equity and good conscience required that the tenancy of the said premises be construed in the context of the letter dated 22 July 1993 and the formal written agreement executed in April 1994, coupled with the act of the defendant handing over the keys to the plaintiff on 24 January 1994 to determine the respective rights and obligations of the landlord and tenant. The consequences of any breach of any of the terms and conditions by either party had to be viewed in the spirit and context in which the tenancy of the premises was entered into, that was, for the use of the 14 units of shop-lots for the purpose of running a college for higher education. (para 17)

(3) The learned judge's finding was totally against the weight of the evidence. He failed to appreciate and evaluate the oral testimony and contemporaneous documentary evidence. It warranted appellate intervention to prevent miscarriage of justice. (para 32)

(4) The plaintiff had observed its obligations under the tenancy agreement by paying the required rental although the defendant was in continuous breach of the various special conditions. The plaintiff was forced to stop paying rental effective August 1994 until all the problems and the breaches have been resolved by the defendant. (para 35)

(5) The defendant failed to remedy the breaches under the special conditions in the tenancy agreement, in particular, the commissioning of the lift and the supply of 3 phase electricity. The water leakage and flooding problem was also not attended to until very much later. The breaches and problems caused hardship and business losses to the plaintiff. The condition of the premises (lack of air-conditioning and non-operation of lift) discouraged many prospective students from enrolling. (para 36)

(6) The defendant cannot equate the equitable withholding of the rent with willful non-payment. Therefore, the fixed term tenancy could not be terminated before its expiration on 28 February 1997, grounded on an alleged default in payment of the monthly rental. The notice of termination of tenancy dated 26 June 1995 was invalid. (para 36)

(7) When there is a cross-claim by the tenant arising from the breaches of the landlord, the landlord does not have an automatic right to terminate the tenancy. It would be grossly inequitable for a party in breach to take advantage of its own breach. (para 36)

(8) Any valid notice to terminate a fixed term tenancy of business premises, in order to be sufficient and reasonable in the absence of any express and unambiguous term in the agreement, shall be not less than three months. (para 36)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/plaintif (J.R. Lincks Educational Consultants Sdn.Bhd.) dan responden/defendan (Goh & Sons Enterprise Sdn. Bhd.) masing-masing adalah penyewa dan tuan tanah bagi 14 unit premis ("premis tersebut"). Melalui surat bertarikh 22 Julai 93 defendan menawarkan untuk menyewa premis tersebut kepada plaintif atas terma dan syarat yang dinyatakan di dalam surat tersebut. Tawaran diterima oleh plaintif. Walaupun tenansi akan bermula pada 1 September 93, milikan premis hanya diberi kepada plaintif pada 24 Januari 94 akibat kelewatan dalam pengeluaran Sijil Kelayakan. Tempoh tenansi terma tetap berkenaan adalah dari 1 Mac 1994 hingga 28 Februari 1997. Kegunaan yang dibenarkan bagi premis tersebut pula adalah "sebagai pejabat dan sebuah kolej". Apapun, perjanjian tenansi yang formal hanya disediakan dan dimeterai pada 11 April 1994. Plaintif menuntut pelaksanaan spesifik terma-terma tenansi dan/atau gantirugi kerana pelanggaran perjanjian tenansi. Defendan menuntut balas memohon milikan premis tersebut bersekali dengan tunggakan sewa serta mesne profit. Yang arif hakim Mahkamah Tinggi memerintahkan supaya plaintif menyerahkan milikan premis tersebut kepada defendan dan membayar tunggakan sewa serta sewaan berganda. Plaintif merayu. Isu-isu yang perlu diputuskan adalah (a) sama ada plaintif berhak kepada sebarang gantirugi; dan (b) sama ada notis yang dikeluarkan oleh defendan bertarikh 26 Jun 95 untuk pembayaran tunggakan sewa, pengosongan serta pengembalian milikan kosong premis tersebut sah. Persoalan pelaksanaan spesifik telah menjadi akademik dan tidak berbangkit kerana tenansi telah pun tamat akibat dari luput masa.

A **Diputuskan (membenarkan rayuan)**
Oleh KN Segara JCA:

(1) Plaintif menjadi penyewa premis ekoran perjanjian tenansi melalui surat bertarikh 22 Julai 1993, sebaik sahaja plaintif
B diberikan milikan kosong premis pada 24 Januari 94, walaupun perjanjian tenansi bertulis formal dimeterai kemudian dari itu. Yang arif hakim telah tersalah arah akan dirinya bilamana memutuskan bahawa tidak wujud perjanjian tenansi berdasarkan mana plaintif boleh menuntut gantirugi bagi
C tempoh sebelum perjanjian tenansi bertulis formal dimeterai.

(2) Berdasarkan fakta kes ini, bagi menentukan hak-hak dan obligasi tuan tanah dan penyewa masing-masingnya, ekuiti dan akal budi mengkehendaki bahawa tenansi premis tersebut
D ditafsirkan di dalam konteks surat bertarikh 22 Julai 93 dan perjanjian bertulis formal yang dimeterai pada April 1994, serta juga tindakan defendan yang menyerahkan kunci kepada plaintif pada 24 Januari 94. Akibat yang terbit dari pelanggaran mana-mana terma dan syarat oleh mana-mana pihak hendaklah dilihat
E dalam semangat dan konteks tenansi premis tersebut dimasuki, iaitu, untuk menggunakan 14 unit lot kedai tersebut untuk maksud menguruskan sebuah kolej pengajian tinggi.

(3) Dapatan yang arif hakim adalah sepenuhnya bertentangan dengan tekanan keterangan. Beliau gagal melihat dan menilai
F testimoni lisan dan juga keterangan-keterangan dokumen kontemporari. Maka ia mewajarkan campurtangan rayuan bagi mengelakkan salahlaksana keadilan.

(4) Plaintif telah menyempurnakan obligasinya di bawah perjanjian
G tenansi dengan membayar sewa yang diwajibkan walaupun defendan terus menerus melakukan kemungkiran terhadap beberapa syarat khusus perjanjian. Plaintif terpaksa memberhentikan pembayaran sewa bermula Ogos 1994 sehinggalah kesemua masalah dan kemungkiran-kemungkiran diselesaikan oleh
H defendan.

(5) Defendan gagal mengatasi kemungkirannya terhadap syarat-syarat khusus perjanjian tenansi, terutama berkaitan pentauliahan lif dan pembekalan elektrik 3 peringkat. Pembocoran air dan
I masalah kebanjiran juga tidak diendahkan sehingga beberapa lama kemudian. Kemungkiran-kemungkiran dan masalah-masalah ini telah menyusahkan dan menjejaskan perniagaan plaintif.

Keadaan premis (ketiadaan penyaman udara dan lif yang tidak beroperasi) membuatkan ramai bakal-bakal pelajar tawar hati untuk mendaftar diri.

(6) Defendan tidak boleh menyamakan penahanan sewa berekuiti dengan perbuatan sengaja enggan membayar. Oleh yang demikian, tenansi terma tetap tidak boleh ditamatkan sebelum ianya tamat pada 28 Februari 1997, dengan beralaskan dakwaan keengganan membayar sewaan bulanan. Notis penamatan tenansi bertarikh 26 Jun 95 adalah tak sah.

(7) Bilamana terdapat tuntutan balas oleh penyewa yang berbangkit dari kemungkiran tuan tanah, tuan tanah tidak mempunyai hak automatik untuk menamatkan tenansi. Adalah amat tidak adil bagi pihak yang melakukan kemungkiran untuk mengambil manfaat atas kemungkirannya.

(8) Untuk menamatkan satu tenansi terma tetap premis perniagaan, suatu notis yang sah, untuk ianya menjadi mencukupi dan munasabah dalam ketiadaan mana-mana terma ekspres dan jelas di dalam perjanjian mengenainya, hendaklah tidak kurang dari tiga bulan.

Case(s) referred to:

British Anzani (Felixstowe) Ltd v. International Marine Management (UK) Ltd [1979] 2 All ER 1063 ***(refd)***

For the appellant - Malik Imtiaz Sarwar (Asma Mohd Yanus with him); M/s Thomas Philip

For the respondent - Edward Saw (FH D'Cruz with him); M/s SK Khoo & Assocs

[Appeal from High Court, Melaka; Civil Suit No: 22-6-1995]

Reported by Amutha Suppayah

JUDGMENT

KN Segara JCA:

[1] The appellant (JR Lincks Educational Consultants Sdn Bhd) and the respondent (Goh & Sons Enterprise Sdn Bhd), were respectively, the plaintiff and defendant in Melaka High Court Civil Suit No. 22-6-1995 filed on 23 January 1995, whereas the respondent was the plaintiff and the appellant was the defendant, in the Melaka Sessions Court Summons No. 52-211-1995 filed on 10 August 1995. The sessions court summons was transferred to

the High Court and consolidated with the High Court civil suit by order of court dated 1 November 1996 (p. 29 rekod rayuan A). The trial of the consolidated actions commenced in the High Court on 20 May 1997 and after a full trial, the learned High Court judge dismissed with costs, on 16 September 1998, the claim of the plaintiff in Melaka High Court Civil Suit No. 22-6-1995 and allowed the claim of the plaintiff in Melaka Sessions Court Summons No. 52-211-1995 with costs, and ordered:

(a) That the defendant (J.R.Lincks Educational Consultants Sdn. Bhd.) deliver vacant possession of the premises to the plaintiff (Goh & Sons Enterprise Sdn. Bhd.);

(b) That the defendant pay to the plaintiff arrears of rental at the rate of RM6000 per month from January 1995 till July 1995;

(c) That the defendant pay the plaintiff double rent at the rate of RM12,000 from August 1995 till date of delivery of vacant possession of the premises;

(d) That the defendant pay interest at the rate of 8% per annum on (b) and (c) above.

[2] The appellant, JR Lincks Educational Consultants Sdn Bhd (hereinafter referred to as "the plaintiff"), dissatisfied with the decision of the learned High Court judge, mounted this appeal on 12 grounds. We are of the view only grounds 1, 2, 4, 6, 7, 8 and 10 merit serious consideration. The respondent, Goh & Sons Enterprise Sdn Bhd, shall hereinafter be referred to as "the defendant", and, its summons in Melaka Sessions Court shall hereinafter be referred to as "the counterclaim".

[3] The plaintiff and the defendant were at all material times the tenant and landlord, respectively, of the premises known as 52C, 54C, 56C, 58C, 60A, 60B, 60C, 60 (Ground Floor), 60 (Mezzanine Floor), 62A, 62B, 62C, 62 (Ground Floor) and 62 (Mezzanine Floor) Jalan Kampung Hulu, Melaka (hereinafter the 14 shop-lots shall, collectively, be referred to as "the said premises").

[4] In a nut-shell, the plaintiff's claim was for specific performance of the terms of a tenancy of the said premises, *viz.* a letter dated 22 March 1994 as well as a written tenancy agreement dated 11 April 1994; and/or damages for breach of the terms of the said tenancy agreements. The defendant's

counterclaim, on the other hand, was for vacant possession of the said premises together with arrears of rental for the period January - June, 1995; rental for the month of July, 1995; and mesne profit from August 1995 till delivery of vacant possession. A

[5] For ease of reference and comprehension, the grounds of appeal which merits serious consideration are reproduced below: B

1. The learned trial Judge erred in fact and in law in concluding,

> Berkaitan dengan kerugian pertama tidak ada perjanjian penyewaan yang mengakibatkan penguatkuasaan perjanjian itu. Pihak-pihak hanya sedang tawar-menawar untuk satu perjanjian penyewaan yang telah mengakibatkan pelaksanaan perjanjian itu. Maka defendan tidak boleh dipertanggungjawabkan untuk kerugian pertama plaintif; C

2. The learned trial Judge was wrong when interpreting special condition No. 10 of the tenancy agreement regarding the lift when holding, D

> Saya berpuas hati bahawa defendan telah mengambil semua langkah yang perlu untuk mengurus lif tersebut. Plaintif tidak menunjukkan bahawa defendan gagal berusaha sedaya upaya. Selanjutnya, mengenai isu ini plaintif tidak membayar pendahuluan RM200.00 sebulan untuk penyelenggaraan dan servis lif tersebut. Defendan adalah terikat untuk mematuhi syarat ini hanya terma-terma yang diletakkan oleh plaintif dipenuhkan terlebih dahulu oleh plaintif sendiri. Plaintif telah tidak memenuhinya'; E F

4. The learned trial Judge was wrong when he totally failed to consider the entire evidence on the breach of the special condition under 1.03 in the tenancy agreement regarding the supply of a 3 phase electricity and by failing to make a finding of fact on this issue; G

6. The learned trial Judge was wrong in fact and in law in misconceiving the unrebutted expert evidence of SP3 on the computation of loss of income which was based on the loss of income when holding, H

> Perkara yang boleh diperhatikan pada awal, atas anggapan tuntutan plaintif memang sah, adalah SP1 dan SP3 telah memberi angka-angka yang berlainan mengenai kerugian yang dikatakan telah dialami oleh plaintif. Ini membuat tuntutan plaintif tidak dapat dikekalkan. Perkara I

A seterusnya yang perlu diperhatikan, atas anggapan yang sama, adalah angka-angka yang diberikan oleh kedua-kedua saksi tersebut tidak pula mengambilkira perbelanjaan yang mungkin telah dialami oleh plaintif dalam mengira kerugian. Kerugian yang telah dialami oleh plaintif, jika ada, adalah jumlah pendapatan yang mungkin diperolehi untuk tempoh tersebut tolak jumlah perbelanjaan yang mungkin telah dialami untuk tempoh tersebut. Dalam ketiadaan keterangan sedemikian adalah mustahil untuk menentukan kerugian yang dialami oleh plaintif. Walaubagaimanapun, adalah pendapat saya bahawa tuntutan ini tidak mempunyai merit.

7. The learned trial Judge was wrong when deciding the notice to quit was valid without considering the issue of sufficiency of notice and further without considering whether a party in breach could take advantage of its own breach by issuing a notice to quit;

8. The learned trial Judge was wrong in failing to take into consideration that the defence witness DW2 had given contradictory and false evidence regarding the problem of the lift; the 3 phase electricity supply and on the termite problem;

10. The learned trial Judge was wrong in ordering the appellant to pay double rental at the rate of RM12,000 per month from August, 1995;

[6] By a letter dated 22 July 1993 (p. 83 rekod rayuan B) the defendant offered to rent the said premises to the plaintiff on terms and conditions set out in the said letter. The offer was accepted by the plaintiff. The material parts of the letter reads:

Re: Lease of Kampung Hulu Shop-Lots to J.R. Lincks College

As requested by you we agree to rent to you the above 4 storey shop-lots (The shop-lots include Lots 21 & 22 (Ground Floor, Mezzanine Floor, 1st, 2nd, and 3rd Floor) and the 3rd floor of Lots 23, 24, 25, and 26) on the following terms and conditions.

1) Rental

$6.000.00 per month for the whole premises.

2) Commencement

From the date of issuance of the Certificate of Fitness (expected date 1st of Sept. 93)

3) Upon confirmation and signing of the tenancy agreement you are required to pay $6,000.00 as security deposit. Upon issuance of Certificate of Fitness you are to pay one (1) month rental in advance (i.e. $6,000.00).

4) Deposit of $1,500.00 for electricity and water.

5) Terms

For a period of 3 years with an extension for a further period of 2 years on the same terms and conditions.

6) Premises:

a) Electrical: We agree to change the electrical system to 3 phase together with the relevant meters.

b) Passage Way: To construct a passage way adjoining Lots 21, 22, 23, 24, 25, and 26.

c) Demolish Walls: To demolish the dividing wall on the 3rd floor between Lots 23, 24 and 25.

To demolish dividing wall on ground floor of Lots 21 and 22.

d) Water: We agree to connect the water supply and meters.

7) Water And Electricity Deposit
You will sign the contract with the relevant authorities and pay for the required deposit.

8) Lightings

...

9) Fans

...

10) Purpose

For office and college.

If you agree to the above terms, please confirm acceptance by signing a copy of this letter and we will request our lawyers to prepare the tenancy agreement and all legal fees, stamp fees to be paid by you.

This offer is open to you for a period of 2 weeks from this date.

...

(signed)

Goh & Sons Enterprise Sdn Bhd

A We hereby agree to the lease of above shop-lots accordingly to the terms herein stipulated.

(Signed)
President
J.R. Lincks College
B For J.R. Lincks Educational Consultants Sdn Bhd.

[7] Following the acceptance by the plaintiff of the offer by the defendant to let the said premises on the terms stipulated in the letter of 22 July 1993, the defendant did not immediately C thereafter, prepare a formal tenancy agreement for the plaintiff to execute. The tenancy of the premises was to commence from the date of issuance of the Certificate of Fitness and the plaintiff was led to believe by the defendant that it would be on 1 September 1993. However, by letter dated 27 August 1993 (p. 85 rekod D rayuan B) the defendant wrote to the plaintiff as follows:

RE: Lease of Kampung Hulu Shop-Lots to J.R. Lincks College

We refer to **our agreement** on the lease of the above office/shop lots to your college dated 22nd July, 1993.

E

Please be informed that there has been a delay in the issuance of the Certificate of Fitness by the relevant authorities and that we are expecting the certificate to be issued tentatively by the 15th of September, 1993.

F We regret any inconvenience caused.

[8] The certificate of fitness was not issued on 15 September 1993. Firman bin Abdullah (PW1) testified, on behalf of the plaintiff, that a director of the defendant told him that the G certificate of fitness had not been issued on 15 September 1993 because the defendant had not complied with the Lembaga Air requirements. The certificate of fitness was finally issued on 31 December 1993 (p. 86 rekod rayuan B) and possession of the premises was given to the plaintiff on 24 January 1994. PW1 H testified, *inter alia*:

The Plaintiff entered into a tenancy agreement with the Defendant (witness referred to p 6 of A). This is the agreement. **The purpose of the tenancy is to house J.R. Lincks College at the premises**. The tenancy was to commence on 1.9.1993. The I Defendant did not give us the premises on 1.9.1993. They were not able to do so as the Certificate of Fitness was not issued. (Witness referred to p 8 of A). This is a letter by the Defendant saying that the premises cannot be occupied. They stated the CF

is to be issued on 15.9.1993. The CF was not issued on that day. It was not issued. The director of the Defendants told me that it is because they have not complied with the Lembaga Air requirements. The CF was finally issued on 31.12.1993. (Witness referred to p 9 of A). This is the CF. Possession of the premises was given to us on 24.1.1994. The Plaintiff was affected as a result of this delay. Firstly, we had to use the Plaza Inn Hotel to conduct our lectures for October, November and December 1993. Secondly we lost two intakes of students i.e.the September 1993 intake and January 1994 intake. The Defendants were aware that the Plaintiff were running a college. This is reflected in the tenancy agreement under para 10. The Plaintiff entered into **another tenancy agreement** with the Defendants **subsequently.** (Witness referred to p 20 of A). It is **dated 11.4.1994**. The **date of commencement** under this agreement was **1.3.1994** for a period of 3 years. The **keys were handed** to the Plaintiff **on 24.1.1994**.

[9] The tenancy agreement, referred to by the plaintiff as dated 11 April 1994 in his evidence, is found at p. 97 rekod rayuan B. It is a formal written tenancy agreement with a schedule and an annexure which is to be read and construed as an essential and integral part of the agreement.

[10] Part 1 of the schedule does not set out the date of the agreement. Nevertheless, under part 9 of the schedule the duration of the tenancy was three (3) years and, under part 10 and part 11 of the schedule respectively, the date of commencement of the tenancy was 1 March 1994 and the date of termination of the tenancy was 28 February 1997. Under part 14 of the schedule, the authorized use of the demised premises is "As offices and as a college". Part 15 of the schedule provides for termination of tenancy as follows:

This tenancy is **a fixed term tenancy** and it is agreed:-

i) The Landlord shall not terminate this tenancy before the expiration period unless the tenant were to breach the terms and conditions provided herein.

ii) In the event the Tenant were to terminate this tenancy before the expiration date, the Tenant shall pay the full balance of the rental due under this Agreement as compensation.

A **[11]** Part 4 of the schedule lists the premises as follows:

4.1 All that four(4) storey shop house held under Lot 21 Town Area X, Melaka Tengah and including the Ground Floor, Mezzanine Floor 1st, 2nd, and 3rd Floor known as 60A, B, and C, Jalan Kampong Hulu, Melaka.

B

4.2 All that (4) storey shop house held under Lot 22, Town Area X, Melaka Tengah and known as 58A, B and C Jalan Kampong Hulu, Melaka.

C 4.3 All the Third Floor space on Lot 23, Lot 24, Lot 25 and Lot 28 Town Area X, Melaka Tengah with free right of passage between the four lots. ... The third floor space is numbered respectively 56C, 54C, 52C and 50C, Jalan Kampong Hulu, Melaka.

D All the above premises are located in Kampong Hulu Melaka and known hereinafter as 'the said premises'.

[12] It is to be noted that part 4 of the schedule makes no reference to 62A, 62B, 62C, 62 (Ground Floor) and 62 (Mezzanine Floor) as part of the premises let to the plaintiff E although it appears from the pleadings that the said shop-lots in fact form part of the premises rented to the plaintiff. This is not disputed, thus making a total of 14 shop lots rented out to the plaintiff for use as a college and offices.

F **[13]** The annexure to the agreement contains special conditions including the following:

1. Renovations

The Landlord agrees with the Tenant to carry out the following renovations to the said premises **upon the signing of this Agreement**:

G

1.01 Passageway

To construct a passageway and demolish the walls adjoining the premises on the 3rd Floor of Lots 21, H 22, 23, 24, 25 and 26 by **1st April, 1994**.

1.02 Demolish Walls

To demolish the dividing walls on the ground floor of Lots 21 and 22 **by 1st March, 1994**.

I

1.03 Electrical

The Landlord shall install a **3-phase electricity** to those parts of the premises as agreed **by the 1st March 1994** and the Tenant to apply for the connection.

10. Maintenance And General Repair Of Lift

The Tenant shall pay RM200-00 per month in advance as contribution for the maintain and service of the lift. **Payment shall commence from 1st April, 1994, subject to the lift being in operation**. The Tenant shall keep the lift clean at all times. The Landlord will try its best to commission the lift by 1st April, 1994.

13. Commencement Of Rental

The **commencement of rental** on 1st March, 1994, is subject to the Landlord to do the followings:

a) **Complete** the **wiring of the 3 phase electricity**.

b) Demolishing the portioning walls of the ground floor.

c) To construct a passageway and demolish the walls adjoining the premises on the 3rd Floor of Lots 21, 22, 23, 24, 25, and 26 by 1st April, 1994.

[14] The plaintiff was given possession of the premises and the keys on 24 January 1994 according to the PW1's testimony. This testimony was never challenged at all. Clearly, the defendant had acknowledged the plaintiff as its tenant of the premises, pursuant to the agreement dated 22 July 1993, when the defendant handed over the keys of the premises to the plaintiff on 24 January 1994 after the CF was issued on 31 December 1993. A formal tenancy agreement with a schedule and annexure was only prepared and executed several months later. It is not very clear when this formal agreement was executed. According to PW1's testimony, it was dated 11 April 1994. However, in his letter dated 3 March 1994 (p. 87 rekod rayuan B), addressed to the defendant's solicitors, there is a reference to the "Tenancy Agreement dated 1 March 1994". This is further compounded by the fact that part 1 of the schedule of the formal tenancy agreement is silent on the date of agreement. Only the 'cover' of the agreement has a date "11 April 1994". In the absence of any clear stipulation, the 'cover' cannot form part of the agreement. On a balance of probability, the said formal tenancy agreement must have been executed on 11 April 1994, as it was stamped on 13 April 1994.

[15] In the light of the chronology of events between the plaintiff and the defendant *vide* the tenancy of the premises, and upon the totality of the undisputed facts and evidence in this case, we hold the plaintiff became tenant of the premises pursuant to the tenancy agreement by letter dated 22 July 1993, immediately upon the plaintiff being given possession and the keys to the premises on 24 January 1994, notwithstanding the execution of a formal written tenancy agreement subsequently, purporting to create a tenancy effective only from 1 March 1994. That tenancy agreement by letter (22 July 1993) was never terminated, rescinded or repudiated. The fact that the defendant waived the rental for the period 1 September 1993 till 1 April 1994 is immaterial, and does not derail the landlord/tenant relationship already in place between the parties. The subsequent formal written agreement was nothing more than a continuation of the tenancy created by the letter of 22 July 1993. This is reinforced by the plaintiff placing on record to the defendant's solicitors by letter dated 3 March 1994, facts pertinent to the tenancy agreement created by letter dated 22 July 1993. The facts contained in the letter were never disputed by the defendant. The letter reads as follows:

> **Re: Rental of Premises**
>
> We refer to your letter dated 28/2/94.
>
> Your client's letter dated 22/7/93 is the basis on which the Tenancy Agreement dated 1/3/94 was entered into between us and your client.
>
> The Tenancy was to commence on 1/9/93 from the expected date of C.F. which date was altered by your client several times giving various excuses and finally your client's En. Andy Goh gave us the key to the premises and a photocopy of the C.F. and put us in possession on 24/1/94.
>
> We were supposed to pay the security deposit and the utility deposit but your client failed to get ready the premises described herein till today in not providing the 3-phase electrical system, passageway, demolish walls, water connection and lightings. Your client neglected the aforesaid from 1/9/93 till the Agreement and as a result of which our losses are made up as follows:
>
> 1. Rental charges for Plaza Inn Conference Room for lectures and lessons;

2. Unable to take in students for the September 1993 and January 1994 intakes resulting in losses amounting to approximately Malaysian Ringgit 1.2 million.

Be as it may be, we entered into the contract, with the rental to commence on 1/3/94 subject to the Landlords complying with the installation of the 3-phase electrical system, construction of passage way, demolition of the walls on the ground floor and 3rd floor and as nothing have been done so far we are not obliged to pay rental yet.

Though your client put us in for the delay, we never waived our losses caused by your client and we are obliged to pay for the premises only if the special conditions are complied with and your client failed in that and is still failing. Therefore, your 1st para in your letter is of no effect. We agreed hoping you will do your part. As for the 2nd para, though we signed the agreement you are still failing in the special conditions to make the premises worthwhile and tenantable to be occupied by us for the purposes you are aware of a college of higher education. If your client do not give something bargained for we have every right to withhold payment. We never entered the premises illegally and your clients were anxious to mitigate our losses and gave the keys to the said premises so that renting Hotel Plaza Inn conference rooms in the interim can be avoided.

We were patient to avoid litigation out of respect of your client and now since you are dragging us to litigation *we give you one week's notice from today's date for your client to comply with all the special conditions in the letter of offer and the Tenancy Agreement* failing which we will resort to our legal remedies as we might be advised.

TAKE NOTICE further we never waived our rights and never had any intention to waive our losses incurred by your client's delay in giving the occupation of the premises based on the letter dated 22/7/93.

Without prejudice to the aforesaid and despite all the shortcomings caused by your client we are prepared to send you our Banker's cheque on your clients assurance that the special conditions are complied with further delay.

[16] The learned trial judge has, therefore, misdirected himself on the facts and the law when he ruled that there was no enforceable tenancy agreement on which the plaintiff could claim damages for any period of time before the formal written tenancy

A agreement was executed (purporting to create a tenancy effective from 1 March 1994) as the parties were negotiating and bargaining prior to the said formal written agreement. Such a finding flies in the face of the undisputed evidence that the keys and vacant possession of the premises were given to the plaintiff
B on 24 January 1994, after the CF was issued, consistent with the terms and conditions contained in the letter dated 22 July 1993. The plaintiff was not bargaining and negotiating. On the contrary, the plaintiff was calling upon the defendant to fulfill the terms and conditions of the tenancy created *vide* the letter 22 July 1993.

C

[17] On the facts of this case, equity and good conscience requires that the tenancy of the said premises be construed in the context of:

D i) the letter dated 22 July 1993;

ii) the formal written agreement executed in April 1994, coupled with the act of the defendant handing over the keys to the plaintiff on 24 January 1994;

E to determine the respective rights and obligations of the landlord and tenant. The consequences of any breach of any of the terms and conditions by either party must be viewed in the spirit and context in which the tenancy of the premises was entered into, that is, for the use of it (14 units of shop-lots) for the purpose of
F running a college for higher education.

[18] In this appeal before us there is primarily only one main issue to be determined, that is, whether the plaintiff is entitled to any damages and, a collateral issue in relation to the defendant's
G counterclaim, that is, whether the notice issued by the defendant dated 26 June 1995 to pay arrears of rental amounting to RM36,000 on or before 30 June 1995 and in the same breath, to quit and deliver vacant possession on 31 July 1995, is valid. The question of specific performance by the defendant of any of the
H terms and conditions of the tenancy agreement (contained in the letter dated 22 July 1993 and the formal written agreement) is now academic and does not arise since the tenancy of the premises has expired by effluxion of time, even as at the date of the decision by the trial judge.

I

[19] The claim by the plaintiff for damages is broken into two stages, that is, a) the first stage of the tenancy agreement, from 1 September 1993 till 24 January 1994 before the plaintiff went into possession and, b) the second stage, from the time the plaintiff went into possession till the expiry of the tenancy.

[20] The claim for damages by the plaintiff can only be considered if there has been a serious breach of the terms and conditions of the tenancy agreement giving rise to a loss to the plaintiff, which is not remote and reasonably foreseeable as a natural and direct consequence of the breach by the defendant landlord. Since there was a counterclaim by the defendant for arrears of rent and vacant possession, the validity of the notice to quit must be considered in the light of the plaintiff's claim against the defendant and not in isolation.

[21] Serious Breaches Of The Terms And Conditions Of The Tenancy Agreement By The Landlord

1. 3-Phase Wiring

Under condition 6) a), contained in the letter dated 22 July 2003, the defendant clearly agreed to change the electrical system of the premises to 3-phase wiring together with the relevant meters. Under condition 1.03 of the special conditions in the annexure to the formal written agreement, the defendant was mandated, as landlord, to "install 3-phase electricity to those parts of the premises as agreed, by the 1 March 1994". Any ambiguity in this condition (in the light of the unequivocal condition 6) a) of the letter dated 22 July 2003), must be read *contra proferentum* the defendant. 3-phase wiring for the premises (the 14 units of shop-lots) would be an essential requisite, as the premises were intended for the running of a college wherein several units of air-conditioners/centralized air-condition, and other essential electrical appliances, such as fans, lights and computers used simultaneously, would require electrical supply that cannot be supported by single phase wiring.

[22] PW1 testified, in examination in chief, *inter alia*:

The defendant was to install 3-phase power supply to the premises. This was not done.

[23] He was not challenged on this assertion in cross-examination. Nevertheless, in re-examination he reasserted and clarified that the defendants did not install the 3-phase wiring system. He testified:

> It is the obligation of the landlord to install the 3-phase electricity. By this I mean the power must be sufficient. **They did not provide the 3-phase wiring system**.

[24] PW4, Mohd Azli bin Abdul Rahim, a customer service engineer from TNB testified, *inter alia*:

> Saya tahu mengenai dokumen berkaitan dengan premises yang diduduki oleh Plaintiff di 60 dan 62 Kampung Hulu, Melaka. No 60 electricity supplied is 3 phase. For No 61 and 62 it is single phase. The original electricity supplied to this premise was single phase including ground floor of No 60. Permohonan untuk upgrade bekalan elektrik untuk premises No 60 tingkat bawah dari satu fasa ke tiga fasa ada dilakukan pada 8.10.93. ... permohonan dilakukan pada 8.10.93 dan pemasangan meter dilakukan pada 22.4.1994. For the other premises occupied by the Plaintiff there was no application to upgrade the system. **Selain No 60 tingkat bawah** premises-premises lain ambil **bekalan letrik hanya satu fasa sahaja.** ... Without 3-phase electric supply it is not possible to run a 20-horsepower aircon even to the other parts occupied by the Plaintiff. This will cause overloading and cause a fire. Where there is one phase wiring then 3-phase electricity cannot be supplied till there is upgrading. **Apart from ground floor of No 60 the wiring on the other parts is single phase.**

[25] PW4 was not cross-examined at all. His testimony stood undisputed. The defendant has, therefore, completely breached condition 6) a) stipulated in the letter dated 22 July 1993, and special condition 1.03 of the formal written agreement. The defendant has only provided 3-phase wiring to the ground floor of No. 60, when it was incumbent on the defendant to provide 3 phase wiring for all the 14 units of shop lots.

2. Non-commissioning Of Lift

By letter dated 26 August 1994 (p. 115 rekod rayuan B) the plaintiff wrote to the defendant, *inter alia*:

> Please be informed that the lift to the premise which you promised to commission by the 1st April 1994 has still not been commissioned although four months have passed. The lift is an inherent part of the premises and we executed the

tenancy contract on the assurance given by yourselves that the lift would be commissioned by the said date. As a result of your failure to comply with this condition, the building has been rendered unfit causing great inconvenience to us and our students in that we are forced to walk up the 4 ½ storey building daily. Further this situation has also caused us to suffer business losses as numerous prospective students have shied away from enrolling at the college thinking that the building is incomplete.

[26] In examination-in-chief PW1 testified:

The Defendant did not commission the lift. It was to be commissioned by 1.4.1994. This has not been done till to-date. The lift is ready for commission. It was ready for commission in 1996. (Witness referred to p 58 of A). This is a letter from Pernas to the Defendants. With regard to the lifts we wrote to the Defendants.

[27] Under cross-examination he testified:

The lift was not put into operation till now. I don't recollect the Defendant asking us to pay the RM200 p.m. The lift was never commissioned. One of the reasons I did not pay the rent was because of the lift.

[28] DW2, Goh Yew Kian, is the Head of Property Administration in the defendant company. Under examination-in-chief he testified (on behalf of the defendant):

(Witness referred to p 34 of A). Under this clause the tenant is to pay RM200 p.m. for maintenance of lift. (Witness reads clause). At that time the lift was not in operation. **The lift was installed in 1992**. (Witness referred to p 17 of A)). This relates to lift. (Witness referred to p 40 of A). (Witness reads 2nd para). Even up to September 1994 we were not able to solve the problem relating to the lift.

[29] Under cross-examination DW2 testified:

(witness referred to Clause 10 at p 34 of A). The lift was to be commissioned by 1.4.1994. The lift was not commissioned by that date. It was due to some technical fault as the PC boards were broken. Prior to the PC boards breaking down the lift was not commissioned. (Witness referred to p 56 of A). This letter is dated 28.10.94. 12 months before this letter the lift was in a position of being commissioned. It was not commissioned. It is a

A construction procedure. We have to get CF first before applying for commissioning of the lift. This letter is dated 4.10.95. As early as 4.10.95 the lift was in a position to be commissioned. **The lift is not in operation till today**. It was not so as we need maintenance for the operation of the lift.

B **[30]** The learned trial judge failed to appreciate that on the oral evidence of PW1 and DW2, as well as the documentary evidence before the court, the plaintiff had irrefutably established that the defendant had totally failed to commission the lift and make it operational by 1 April 1994 or, at any time, during the currency C of the plaintiff's tenancy of the premises. If the lift was not commissioned, it could not be operational. The plaintiff's obligation to pay a sum of RM200 per month as contribution for the maintenance and service of the lift from 1 April 1994 takes effect under special condition 10 of the agreement only if the lift is in D operation. Special condition 10 is explicit and there is no room for any doubt as to when plaintiff's obligation there under to pay the said sum of RM200 commences. Special condition 10 reads as follows:

E 10. Maintenance And General Repair Of Lift

The Tenant shall pay RM200-00 per month in advance as contribution for the maintain and service of the lift. Payment shall commence from 1st April, 1994, subject to the lift being in operation. The Tenant shall keep the lift clean at all times. The F Landlord will try its best to commission the lift by 1st April, 1994.

[31] The learned trial judge has, therefore, seriously misdirected himself in holding that he was satisfied that the defendant had G taken all necessary steps to operate the lift and that the plaintiff had failed to pay RM200 per month for the maintenance and service of the lift. In his grounds of judgment the learned judge stated:

H Saya berpuashati bahawa Defendan telah mengambil semua langkah yang perlu untuk menguruskan lif tersebut. Plaintiff tidak menunjukkan bahawa Defendan gagal berusaha sedaya upaya. Selanjutnya, mengenai isu ini Plaintiff tidak membayar pendahuluan RM200.00 sebulan untuk penyelenggaraan dan servis lif tersebut. Defendant adalah terikat untuk mematuhi syarat ini hanya jikalau I terma-terma yang diletakkan oleh Plaintif dipenuhkan terlebih dahulu oleh Plaintif sendiri. Plaintif telah tidak memenuhinya.

[32] The learned trial judge's finding is totally against the weight of the evidence. He failed to appreciate and evaluate the oral testimony and contemporaneous documentary evidence. It warrants appellate intervention to scrutinize the record and arrive at findings of fact consistent with the evidence adduced to prevent any miscarriage of justice.

Withholding Rent Because The Defendant In Breach/Validity Of Notice To Quit And Sufficiency Of Notice To Deliver Vacant Possession

[33] PW1 testified under examination-in-chief:

> **The plaintiff stopped payment of rental to the Defendant from January 1995**. The Plaintiff had made numerous complaints to the Defendant about the various breaches but we found that they were not complying with the terms of the tenancy agreement and did not remedy the breaches accordingly even though they had been collecting rental from the commencement of the tenancy. We felt we were taken for a ride. The Plaintiff gave written notice to the Defendant before stopping rent on 26/8/1994. It is at page 38 of A. The Defendant in October 1994 attended to the sewerage problem and provided us the dustbin. The other breaches were not rectified at that time.
>
> The Defendants did not rectify the breach with regard to the lift and the upgrading of the power supply till to-day [20/5/97]. With regard to the other breaches the Defendant sealed the sewerage tank to prevent the obnoxious smell in October 1994. As for the flooding they attended to it at the end of 1996. As for the termites they treated the ground floor around September/October 1994. Rubbish bins were provided in September 1994.
>
> With all the breaches and problems the Plaintiff did not move out of the premises was that we did not want our reputation to be tarnished in that being a college we had to have some degree of permanency of location. Also we had notified the Ministry of Education that we would be at these premises for the duration of 3 years. Also it is part of the condition of the 2nd tenancy agreement (Schedule 15(2)) where we have agreed that the tenancy shall be a fixed term tenancy and that in the event of the Plaintiff terminating the tenancy before the expiry date the tenant shall have to pay the full balance rental due to the Defendant as compensation. …

[34] The letter dated 26 August 1994 written by the plaintiff to the defendant is as follows:

> We refer to the tenancy agreement dated 11 April 1994 ...
>
> Please be informed that the lift to the premise which you promised to commission by 1st of April 1994 has still not been commissioned although four months have passed. The lift is an inherent part of the premises and we executed the tenancy contract on the assurance given by yourselves that the lift would be commissioned by the said date. As a result of your failure to comply with this condition, the building has been rendered unfit causing great inconvenience to us and our students in that we are forced to walk up the 4 1/2 storey building daily. Further, this situation has also caused us to suffer business losses as numerous prospective students have shied away from the enrolling at the college thinking that the building is incomplete.
>
> In addition to the problem of the lift, leakages in the *façade* of the building has also led to the flooding of the premises whenever it rains. Even though numerous verbal complaints have been made no action has been taken.
>
> Apart from this, the sewerage tanks located on the ground floor of the premises are emitting obnoxious smell making the ground floor uninhabitable. The ground floor is also infested with termites which have attacked our books in the library causing damages to a tune of over one thousand ringgit. Verbal complaints about this matter to your office too has fallen on deaf ears.
>
> Besides, our written complaint to your solicitors dated 21st March 1994 stating that the incoming power (60 amps) to the premises is insufficient to support our central air-conditioning system has also not been attended to nor remedied rendering our 20 h.p. central air-conditioning unit to be inoperable.
>
> As landlord, you have also failed to provide rubbish bins for refuse disposal neither in front nor the rear of the building.
>
> Please bear in mind we agreed to forego our earlier claims for losses which runs into millions of ringgit due to your failure to honour the initial agreement dated 22 July 1993; on the express understanding that you would cause us to suffer any further inconvenience nor losses. However your continous breach in not commissioning the lift and in not attending to the other complaints has put us into great distress and financial losses.

> Please take note that in view of the seriousness of the situation, **we are forced to stop the rental payment effective August until all the problems have been resolved to our satisfaction**.
>
> Further take notice that if you as landlord fail to perform your obligations as covenanted and compensate us adequately for the losses already suffered as a result of the various breaches within 7 days; you give us no alternative but to seek legal redress through court action.

[35] There is no dispute that the plaintiff had faithfully observed its obligations under the tenancy agreement dated 11 April 1994 by paying the required rental and utility deposits on 28 March 1994 and thereafter, continued to promptly and dutifully pay rental for the next four months although the defendant was in continuous breach of the various special conditions. In order to safeguard the plaintiff's interest and rights and to compel the defendant to comply with its obligations, the plaintiff wrote the letter dated 26 August 1994 (quoted above) so as to bring the serious state of affairs and the defendant's breaches to its attention. The plaintiff made it clear, and in no uncertain terms, that the plaintiff was forced to stop (or withhold) rent effective August 1994 until all the problems and the breaches have been resolved by the defendant.

[36] It cannot be disputed that apart from attending to the septic tank and the termite problems, the defendant failed to remedy the breaches under the special conditions, in particular, the commissioning of the lift and the supply of three phase electricity. The water leakage and flooding problem was also not attended to until very much later. Naturally, the breaches and problems caused hardship and business losses to the plaintiff. The condition of the premises (lack of air-conditioning and non-operation of lift) would discourage many prospective students from enrolling. Erosion in the confidence and reputation of the college would be an inevitable consequence.

[37] In the above circumstances, has the plaintiff the right to withhold rent, especially when the plaintiff contends that its losses as a result of the breaches far exceeds the rent due and, that the defendant has refused or neglected to compensate the plaintiff's for its losses? In *British Anzani (Felixstowe) Ltd v. International Marine Management (UK) Ltd* [1979] 2 All ER 1063, it was held:

(iii) The existence of the common law right amounting to set-off against rent did not, however, preclude the defendants from relying on the doctrine of equitable set-off, since, except in case of distress or replevin, *equity had never refused to interfere to protect a tenant whose landlord was bringing proceedings based on non-payment of rent if the tenant had a bona fide cross-claim for unliquidated damages against the landlord,* provided the tenant had no common law remedy and fulfilled the preconditions for the application of the equitable doctrine.

(iv) In order to rely on the doctrine of equitable set-off the defendant had to show, *inter alia*, that their counterclaim was so directly or closely connected with the plaintiff's claim as to go to the foundation of that claim.

(v) However, it was not essential for the application of the doctrine for the claim and counterclaim to arise out of the same contract: it was sufficient if the defendants' counterclaim arose out of a transaction so closely connected with the lease that it would be manifestly unjust not to allow a set-off. Since the defendants counterclaim arose out of alleged breaches of the agreement of 7th June 1973 which had rendered the warehouses unfit in part for the purposes for which they were leased, and because *it would be manifestly unjust to allow the plaintiffs to recover rent without taking into account damages caused by the plaintiffs' failure to perform their part of the agreement,* the defendants had established a sufficiently close connection between the transactions for them to raise their counterclaim as a set-off against the plaintiffs' claim.

[38] We are of the view the *ratios* quoted above support and establish the plaintiff's right to withhold rent based on the doctrine of equitable set-off of the plaintiff's unliquidated cross-claim against the defendant's claim for arrears of rent. Consequently, the plaintiff cannot be said to be in breach of the tenancy agreement with regard to the payment of the reserved rent within the time and manner stipulated therein. The defendant cannot equate the equitable withholding of the rent with willful non-payment. In the circumstances of this case, the fixed term tenancy cannot be terminated before its expiration on 28 February 1997, grounded on an alleged default in payment of the monthly rental. The notice of termination of tenancy dated 26 June 1995 is invalid. When there is a cross-claim by the tenant arising from the breaches of the landlord, then, the landlord does not have an automatic right to terminate the tenancy by issuing a notice to quit. It would be grossly inequitable for a party in breach to take advantage of its own breach.

[39] The plaintiff was at all material times operating a college at the demised premises where third party interests (primarily that of the students) are directly affected by any interruption to the use of the premises by a sudden and unexpected termination of the tenancy. Any notice to quit business premises must give adequate and sufficient time for the tenant to find new premises to relocate and continue its business from there. The notice dated 26 May 1995, giving 35 days to give vacant possession, is unreasonable. In our view, any valid notice to terminate a fixed term tenancy of business premises, in order to be sufficient and reasonable in the absence of any express and unambiguous term in the agreement, shall be not less than three months.

[40] In the above circumstances, we are of the view that the learned trial judge has misdirected himself on the law and the facts when he held the said notice to quit and deliver vacant possession was valid. We hold that in the circumstances of this case, the withholding of rent by the tenant is permitted in law and the defendant cannot terminate the fixed term tenancy prematurely. We further hold that the defendant is, therefore, not entitled to mesne profits for the unexpired period of the fixed tenancy.

Specific Performance/Damages

[41] The learned trial judge was correct in holding that the question of specific performance did not arise as the tenancy had expired by effluxion of time. However, on the question of damages, we are of the view that the learned trial judge had erred in holding that PW1 and PW3 had given different figures in the computation of the loss and, by reason thereof, the claim of the plaintiff was not maintainable. We hold that in view of the serious breaches of the terms of the tenancy agreement by the defendant already discussed above, the plaintiff is entitled to a claim in damages. We also hold that the learned trial judge erred in his finding that the figures given by the said two witnesses had not taken into consideration the expenses incurred by the plaintiff in computing the loss. He held that the loss suffered by the plaintiff, if any, would be the total income that is likely to be received for the period (of the fixed term) less the total likely expenses for the said period. He held there was absence of such evidence and, therefore, it was impossible to determine the loss suffered by the plaintiff. He further held that the claim by the plaintiff was without merit.

[42] The learned trial judge failed to appreciate the totality of the evidence and that the evidence of PW3 (an experienced accountant) was never challenged at all. PW1 produced a schedule of fees for the various courses (exh. P1). The average number of students was determined as between 40 and 50 students by reference to the infrastructure of the premises and the expected student intake. Documents pertaining to student inquiries were produced and student intake for the relevant periods was established through the student admission records.

[43] PW3 prepared a report on the loss suffered by the plaintiff from 1 March 1994 to 28 February 1997 and he was never cross-examined at all. It was marked P6 (rekod rayuan C2 p. 1409). PW3, who is a certified public accountant, testified:

> On the instructions of the Plaintiff I prepared a report on the loss suffered by the Plaintiff from 1 March 1994 to 28 February 1997. (Witness shown a report). This is the report – marked as P6. This is a loss of income report for that period. Their estimated loss for 3 years is $1,459.500.00. This is at appendix 1 of P6. This figure is a comparison from the previous premises and the current premises and on a progressive method. At the previous premises the income was about $802,087.07 for the 3 years. At the present premises it $396,032.80. By "progressive basis" is meant when a new college is started the student intake goes on a progressive basis. Normally the intake increases from 20 - 30% from previous intake.
>
> Basically the losses on income, losses on profit and losses on wasted expenditure. In loss of income the expenditure is normally fixed so that the income is on a progressive scale. In such a situation the expenditure is fixed. In loss or profit the expenditure is variable to the income. In loss of wasted expenditure the income is not certain and the expenditure is wasted. P6 is based on the loss of income method. In preparing P6 I did not take into account the expenditures. This is because the expenditure are fixed. A teacher can teach a class with 1 student to the maximum. If a class has more than 50 students the expenditure increase will be marginal. P6 is a fair report as the method used is the norm. This method is normally used to make calculation for schools and private college.
>
> (Witness referred to P2). This was given to me. From P2 the loss claimed is $405,775.00. According to P6 the loss is $1,459,500.00. The difference is because the student number used by PW1 is very small whereas in a normal situation the number can be between 20-30. In P6 I took into account the actual loss

and prospective loss of income. I am qualified to prepare this loss of income report. I consider myself as an expert in preparing this kind of reports. I have prepared such reports before as an expert.

[44] In appendix 4 of his report, PW3 set out a summary of background information as follows:

The college was established in March 1990 at the Bastion House, 1 Jalan Kota, Melaka and operated there till September 1993.

Thereafter it operated from its present premises since March 1994.

The college is situated in a 5 storey building having its address as 60-62, Jalan Kampung Hulu, Melaka.

The college is occupying the ground floor to third (3rd) floor (including the mezzanine floor) all in five (5) floors.

In total it is occupying fourteen (14) shop lots.

The college has the following facilities available:

1. Eight (8) Lecture rooms
2. Four (4) Tutorial rooms
3. One (1) Computer Laboratory
4. One (1) Student Lounge
5. One (1) Typographical Laboratory
6. The library can accommodate 100 students

There are fourteen (14) lecturers full time and part time teaching various courses.

[45] In appendix 2 of his report, PW3 set out the "Income that can be derived in conducting professional courses." He detailed as follows:

The following professional courses were offered:

1. The Charted Association of Certified Accountants (Level)
2. The Institute of Charted Secretaries and Administration (Pre - Professional levels)
3. Charted Institute of Marketing
4. Private Secretarial Course
5. Bachelor of Laws (LLB)-University of London

(Apart from these courses the college also conducts the B.A. in English of the University of London, the LCCI Diploma, GCE A Level and, IBBM Diploma courses)

The fees for the professional courses is between RM2,725 to RM3,225.

From previous record of attendance for each popular professional course the student number can be at least about ten (10) students. Taking five (5) popular professional courses from above, the student number can be fifty (50) students per intake and minimum course fee is RM2,725 per student.

The maximum number for the English Language Proficiency Course can be about fifty (50) students per intake and the course fee is RM625 per student.

[46] There were three intakes of students at the college every year, that is, in January, April and September. In appendix 3 of his report, PW3 worked out the losses for the period September 1993 till January 1997, that is, from intake No. 10 till intake No. 20. His detailed computation is based on the ideal number of students set at 50 throughout the period in question for the professional courses and the English Language Proficiency course and the actual number of students. In appendix 3, PW3 has computed the losses at RM1,459,500.

[47] We find the basis of computation by PW3 of the plaintiff's loss of income fair and reasonable.

[48] In the above circumstances, based upon the unchallenged report P6 prepared by PW3, we assess general damages for the plaintiff as follows:

Loss for the period January 1994 till March 1994: (inability to take students for the January 1994 intake, ie, intake No. 11)	167,000.00
Loss for the period April 1994 till February 1997, ie expiry of tenancy on 28/2/97: (loss *vide* intake No. 12 till intake No. 20)	1,124,500.00
	1,291,500.00

Less		
Arrears of rental for 31 months at RM6,000.00 per month (ie, from August 1994 till February 1997, covering the period the plaintiff began with-holding rent in August 1994 till the expiry of tenancy on 28th February 1997):	186,000.00	
Less Deposit	24,000.00	
	162,000.00	162,000.00
		1,129,500.00
Add		
RM30,000.00 deposited in Court by plaintiff and paid out to the defendant:		30,000.00
Total:		RM1,159,500.00

[49] We are unanimous that this appeal be allowed. The decision of the learned trial judge *vide* Melaka High Court Civil Suit No. 22-6-1995 and Melaka Sessions Court Summons No. 52-211 1995 is set aside. The appellant's claim in High Court Melaka Civil Suit No. 22-6-1995 is allowed and general damages is assessed at RM1,159,500, with interest at 8% per annum from date hereof (19 November 2007).

[50] The respondent shall be entitled to vacant possession of the premises at the expiration of the tenancy on 28 February 1997, in the absence of any renewal of the said tenancy and in such event, the appellant shall pay the respondent double rent at the rate of RM12,000 per month from March, 1997 till date of delivery of vacant possession with interest thereon at 8% per annum.

[51] The appellant shall be entitled to its costs here and the court below. Deposit to be refunded to the appellant.